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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-218445; B-218445.2 DATE: June 20, 1985

MATTER OF: Solid Waste Services, Inc.

DIGEST:

Contracting officer's determination that an affiliate of debarred contractor is ineligible for contract award is reasonable where the affiliate was incorporated after the contractor received a notice of proposed debarment and the affiliate will employ assets of debarred firm.

Solid Waste Services, Inc. (SWS) protests the award of a contract for waste disposal services to John C. Holland Enterprises, Inc., under invitation for bids (IFB) No. N62470-85-B-6008 issued by the Norfolk Naval Shipyard, Portsmouth, Virginia. SWS essentially contends that the solicitation is ambiguous and that Holland's low bid is nonresponsive. We dismiss the protest.

SWS, the second low bidder, is wholly owned by J.P. Mascaro & Sons, Inc. By letter dated March 8, 1985, the Chief of Naval Material issued a formal "notice of proposal to debar" Mascaro. The causes for the proposed debarment were the following: 1) conviction of the secretary and part-owner of Mascaro in 1984 on 12 counts of theft by deception and in 1977 for theft by deception and false statements; 2) conviction of the vice-president of the firm in 1977 on federal charges of mail fraud and false statements; and 3) the firm itself was convicted in 1977 in the state courts for theft by deception, unsworn falsification and deceptive business practice. The Chief of Naval Material's notice stated:

"Pending the debarment determinations, bids or proposals shall not be solicited from, contracts shall not be awarded to, existing contracts shall not be renewed or otherwise extended, and sub-contracts shall not be consented to or approved for [Mascaro] within the Department of Defense, unless the Secretary concerned or his authorized representative states in writing a compelling reason to do so."

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Approximately 20 days after receiving this notification of proposed debarment from the Navy, Mascaro incorporated SWS in the state of Pennsylvania ^{1/} and the Navy has been informed that SWS plans to use the labor, equipment, and capital of Mascaro to perform any contracts that it might obtain. The Navy considers SWS, as well as Mascaro, ineligible to receive any contract awards.

SWS argues that under the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.407-1(c)(1984), affiliates of suspended contractors are not automatically suspended unless separately named and given an opportunity to respond. Further, the Navy Debarment Committee has been provided information by SWS concerning its voting trust in anticipation of being permitted to conduct government contracting business despite the debarment of its parent. The matter is still pending and the Debarment Committee has not reached a decision.

The Navy argues that the circumstances create an irrebuttable presumption of "identity" of Mascaro and SWS so that SWS is clearly ineligible to receive any contract awards. The Navy further argues that a voting trust does not preclude operation of SWS by former Mascaro officers and insists that justice demands that the corporate veil be pierced.

Our review of this matter is restricted to an examination of whether the contracting officer's determination that SWS was ineligible was reasonable. See Atchison Engineering Co., B-208148.5, Aug. 30, 1983, 83-2 CPD ¶ 278. While debarment does not necessarily "include any affiliates of the contractor [unless] specifically named and . . . given . . . an opportunity to respond," see FAR, 48 C.F.R. §§ 9.406-1(d), 9.407-1(c), the protester's reliance on this provision is misplaced. We fail to see how an agency debarment committee can name and give notice to a nonexistent affiliate. Here, it appears

^{1/} SWS did identify itself as a wholly-owned subsidiary of Mascaro in its bid and stated therein as follows: "[SWS] is 100% owned by [Mascaro]; however, all of the stock of [SWS] has been placed in a voting trust and is voted and controlled by the trustee rather than by the owner, [Mascaro]."

that the affiliate was created after the Navy's notice of proposed debarment of the parent and solely for the purpose of avoiding the effects of the debarment of the parent. We think it is reasonable that the cited regulation be held applicable only to affiliated companies that were in existence at the time the notice of debarment was issued. Otherwise, the debarment process would be seriously impaired if contractors can so easily and with such impunity avoid its effects. Thus, we think the contracting officer's determination that SWS is ineligible for award, at least while a determination by the Debarment Committee is pending, is reasonable.

Since SWS is temporarily ineligible for contract award, it is not an interested party under our Bid Protest Regulations. See 4 C.F.R. § 21.0(a) (1985). Therefore, we will not consider the merits of the protest.

The protest is dismissed.

Harry R. Van Cleve
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General Counsel